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No. 96 -

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

STATE OF NEW JERSEY,
Petitioner,

vs.

ERIC WOMACK,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of New Jersey

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a civil penalty which is not disproportionate to the government's damages and costs bars a subsequent criminal prosecution on double jeopardy grounds if there was a "punitive intent" to the penalty.

2. Whether the order of the criminal and civil proceedings has any significance in determining the existence of a double jeopardy violation under *United States v. Halper*.

PARTIES BELOW

The State of New Jersey, by the Attorney General of New Jersey, is the petitioner in this case. The respondent is Eric Womack.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. ___

STATE OF NEW JERSEY,

Petitioner,

vs.

ERIC WOMACK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The Attorney General of New Jersey, on behalf of the State of New Jersey, respectfully prays that a writ of *certiorari* issue to review the judgment and opinion of the Supreme Court of New Jersey entered in this case on July 25, 1996.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division, is not reported. It is reprinted as App. B, *infra*, pp. 14a-31a.

The opinion of the Supreme Court of New Jersey is reported at 145 *N.J.* 576, 679 *A.*2d 606 (1996), and is reprinted as App. A, *infra*, pp. 1a-13a.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 25, 1996. The jurisdiction of this Court is invoked under 28 *U.S.C.* § 1257(a).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The provisions of *N.J. Stat. Ann.* 2C:21-20, 45:1-14, 45:1-23, 45:1-25, 45:9-18, and 45:9-22 are reprinted as Appendices H - M, *infra*, pp. 49a-53a.

STATEMENT OF THE CASE

On June 15, 1993, the New Jersey Attorney General's Office, on behalf of the State Division of Consumer Affairs, filed a verified complaint charging respondent (hereinafter defendant), Eric Womack, with the unlicensed practice of

medicine in violation of the Medical Practices Act, *N.J. Stat. Ann.* 45:9-1 *et seq.* (West 1991). The State sought an order enjoining defendant from engaging in the unlicensed practice of medicine, and a judgment for civil penalties and costs pursuant to *N.J. Stat. Ann.* 45:1-25 (West 1991). App. D, *infra*, at pp. 34a-38a. A temporary restraining order was entered when the complaint was filed. App. E, *infra*, at pp. 39a-42a. On June 17, 1993, an investigator employed by the New Jersey Division of Consumer Affairs filed a criminal complaint against defendant.

On July 2, 1993, the state court issued an Order Modifying Restraints that permanently restrained and enjoined defendant from engaging in the practice of medicine. App. F, *infra*, at pp. 43a-46a. On November 16, 1993, the court filed a Consent Order that incorporated the provisions of the July 2, 1993 order, and imposed civil penalties and investigative costs totalling $8,554.07. App. G, *infra*, at pp. 47a-49a. In this regard the Order provided:

> 2. Defendant Eric Womack shall pay to the State of New Jersey the sum of $5,000.00 in civil penalties and $3,554.07 in investigative costs, plus interest as provided by R. 4:42-11, for the offenses alleged in the complaint and for holding himself out as eligible to treat, offering to treat and actually treating persons not named in the Complaint for physical ailments and illnesses.

On December 2, 1993, an Essex County Grand Jury

returned Indictment No. 4152-12-93 charging defendant with practicing medicine without a license, a third-degree crime, in violation of *N.J. Stat. Ann.* 2C:21-20 (West 1995). App. C, *infra*, at pp. 32a-33a.

Prior to trial, defendant moved to dismiss the indictment on the grounds that the indictment was barred by the Double Jeopardy Clause of the United States Constitution. On September 23, 1994, the trial court concluded that the indictment was barred on double jeopardy grounds, and accordingly dismissed it with prejudice.

On May 15, 1995, the Superior Court of New Jersey, Appellate Division, reversed the order of the trial court and found that double jeopardy did not require a dismissal of the instant indictment. In so doing, the Appellate Division correctly discerned that the costs and penalties totalling $8,554.07 assessed against defendant in the civil matter prior to his indictment were not so disproportionate to the aggregate expenses incurred by the State in the civil action as to constitute punishment for purposes of double jeopardy. App. B, *infra*, at pp. 14a-31a.

On July 25, 1996, the Supreme Court of New Jersey issued its opinion in which it reversed the Appellate Division decision reinstating the indictment, notwithstanding the court's finding that the $5,000 penalty imposed in the civil proceedings did "not approach the grossly disproportionate level and is rationally related to the costs necessary to compensate the State." *State v. Womack*, 145 *N.J.* 576, 584, 679 *A.*2d 606, 610 (1996); App. A, *infra*, p.6a. The court found that the amount of the civil penalty was indicative of a remedial purpose but it was troubled by the language in the civil judgment which divided the penalty into "investigative

costs" and "civil penalty." *Id.*[1] The court noted that "had the civil penalty been imposed as a single and indivisible lump-sum fine, and not been divided into two parts labelled 'civil penalty' and 'investigative costs,' ... the *Halper* standard would support a finding that the fine was simply remedial in nature." *Id.*, 145 *N.J.* at 584, 679 *A.*2d at 609; App. A, *infra*, p.6a.

The court went on to find that double jeopardy would bar the criminal prosecution if it was the intention of the parties at the time of the civil judgment to punish defendant. The court held that a remand was necessary to determine the intent of the parties at the time the civil penalty was imposed. "If it is clear that the intent of the State and the court at the time the fine was imposed was to punish defendant, then double jeopardy would bar this criminal action." *Id.*, 145 *N.J.* at 584-585, 679 *A.*2d at 610; App. A, *infra*, p.7a.

The New Jersey supreme court then provided a remedy for removing the double jeopardy obstacle. The court held that even if the civil penalty imposed on defendant was intended to be punitive, the State might be able to avoid the double jeopardy bar if it could return the punitive portion of the civil fine. *Id.*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, p. 8a. The court held that "[i]f the State is able to return to the trial court that entered the judgment and alter or amend the consent judgment so as to eliminate the punitive

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[1]There was a dispute between the parties as to whether the trial prosecutor, at oral argument on the motion to dismiss, conceded that the $5,000 penalty was punishment. The state court found that "although the prosecutor's concession at oral argument below that the fine was punitive is not dispositive of the issue, the concession indicates that, at the very least, the prosecutor understood the sanction to have a punitive purpose." *State v. Womack*, 145 *N.J.* at 584, 679 *A.*2d at 609; App. A, *infra*, p. 6a.

portion of the civil penalty and if the State returns that portion to defendant, the double jeopardy bar to this action would be lifted." *Id.*, 145 *N.J.* at 585-586, 679 *A.*2d at 610; App. A, *infra*, p. 8a.

The New Jersey supreme court also rejected the State's argument that even if the civil fine was punitive, there was no bar to the subsequent criminal action because the Double Jeopardy Clause bars only civil prosecutions after criminal penalties, not criminal prosecutions after civil penalties. *Id.*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, p. 7a. The state court instead found that the order of the civil and criminal proceedings is not material in determining a double jeopardy violation. *Id.*

REASONS FOR GRANTING THE PETITION

This case presents important questions under the Double Jeopardy Clause which are necessarily implicated by this Court's decision in *United States v. Halper*, 490 *U.S.* 435 (1989) and have been left unresolved by the subsequent decisions in *Department of Revenue of Mont. v. Kurth Ranch*, 511 *U.S.* ___, 114 *S.Ct.* 1937 (1994), and *United States v. Ursery*, ___ *U.S.* ___, 116 *S.Ct.* 2135 (1996). Namely, "whether an ostensibly civil proceeding that is designed to inflict punishment may bar a subsequent proceeding that is admittedly criminal in character." *Department of Revenue of Mont. v. Kurth Ranch*, 114 *S.Ct.* at 1947 n.21. See *United States v. Ursery*, 116 *S.Ct.* at 2140 n.1. The Supreme Court of New Jersey, in dismissing a criminal indictment which was prosecuted following the imposition of a penalty in a civil proceeding, held that a civil penalty which is not disproportionate to the government's damages and costs nevertheless bars a subsequent criminal prosecution on double

jeopardy grounds if there was a punitive intent to the penalty. *State v. Womack*, 145 *N.J.* 576, 584, 679 *A.*2d 606, 609-610 (1996); App. A, *infra*, pp. 6a-7a.

The New Jersey supreme court further held that the order of the civil and criminal proceedings was immaterial in determining whether double jeopardy bars imposition of both civil penalties and criminal punishment. *Id.*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, p.7a. In *Womack*, the civil proceedings preceded the criminal prosecution and the state court ruled that double jeopardy required the dismissal of the criminal indictment unless the punitive aspects of the civil penalty could be removed. This decision is an unwarranted extension of the *Halper* decision and threatens the ability of the lower courts to pursue appropriate civil remedies without jeopardizing potential criminal prosecutions. Similar challenges are being raised with increasing frequency in the state and circuit courts and guidance is needed in this area. This Court's review is therefore warranted.

A. A Civil Penalty Which Is Rationally Related And Proportionate To The Government's Costs And Damages Does Not Constitute "Punishment" Under The Double Jeopardy Clause.

The Double Jeopardy Clause provides that "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life and limb." U.S. Const., Amendment V. This Clause protects against three harms: prosecution for the same offense after acquittal, prosecution for the same offense after conviction, and multiple punishment for the same offense. *United States v. Di Francesco*, 449 *U.S.* 117, 129 (1980); *North Carolina v. Pearce*, 395 *U.S.* 711, 717 (1969). The protection against multiple punishments prohibits the

Government from "'punishing twice, or attempting a second time to punish criminally for the same offense.'" *Witte v. United States*, 515 *U.S.* ___, ___, 115 *S.Ct.* 2199, 2204 (1995) (emphasis omitted), (quoting from *Helvering v. Mitchell*, 303 *U.S.* 391, 399 (1938)).

In *United States v. Halper*, 490 *U.S.* 435 (1989), this Court considered "whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes 'punishment' for the purpose of double jeopardy analysis." *Id.* at 443. The standard enunciated in *Halper* -- regarded by this Court as a rule of reason -- to ascertain whether a civil sanction constitutes punishment for jeopardy purposes is essentially one of proportionality:

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceedings bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's *damages* and *costs* to determine if the penalty sought in fact constitutes a second punishment. [*Id.* at 449. (emphasis added)].[2]

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[2]Applying this standard to the *Halper* case, this Court concluded that the statutory penalty of $130,000 was so disproportionate to the damages

(continued...)

However, in departing from fifty years of settled double jeopardy jurisprudence, this Court took considerable pains to emphasize the limited reach of the *Halper* opinion. Indeed, this Court specifically reaffirmed its prior holdings in *Helvering v. Mitchell*, 303 *U.S.* 391 (1938); *United States ex rel. Marcus v. Hess*, 317 *U.S.* 537 (1943), and *Rex Trailer Co. v. United States*, 350 *U.S.* 148 (1956), where no such accounting was required. *Halper*, 490 *U.S.* at 441-442.[3] The Court stated that the relevant teachings of *Mitchell*, *Rex Trailer*, and *Hess* is that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, . . . without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis." *Halper*, 490 *U.S.* at 446. This Court cautioned that it was announcing a rule for

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[2](...continued)
sustained by the government as to necessitate a remission -- not, significantly, a dismissal -- of the penalty. *United States v. Halper*, 490 *U.S.* at 452.

[3]In *Mitchell*, the civil penalty was the amount of the taxes defrauded, plus 50%. In *Hess*, the civil penalty was $315,000, of which $112,000 reflected a sanction of $2,000 per count for 56 counts, and the remaining $203,000 represented double the actual damages. In *Rex Trailer*, the defendants fraudulently purchased five trucks under the Surplus Property Act of 1944 by claiming veteran priority rights to which they were not entitled. Recognizing that the actual damage caused by the defendants "was difficult if not impossible to ascertain" (*Halper*, 490 *U.S.* at 445, discussing the holding of *Rex Trailer*), the Court nevertheless sustained a civil penalty (imposed after a criminal conviction) of $10,000 ($2,000 per count for each of the five trucks) and likened this penalty "to the recovery under liquidated-damage provisions which fix compensation for anticipated loss." *Rex Trailer*, 350 *U.S.* at 153. In this case, defendant's civil penalty was $5,000, a fixed penalty provided under statute. See *N.J. Stat. Ann.* 45:1-25, App. K, *infra*, p5/a.

the "rare case" in which "a fixed-penalty provision subjects a prolific offender to a sanction overwhelmingly disproportionate to the damage he has caused," so that the sanction "may not be characterized as remedial, but as a deterrent or retribution," and therefore "punishment" within the meaning of the Double Jeopardy Clause. *Id.* at 449.

The New Jersey supreme court applied the *Halper* proportionality test and found that the $5,000 penalty imposed in the civil proceedings did not "approach the grossly disproportionate level and is rationally related to the costs necessary to compensate the State." *State v. Womack*, 145 *N.J.* at 584, 679 *A.*2d at 610; App. A, *infra*, p.6a. For this reason the state court determined that no further examination of the actual costs underlying the civil action was even necessary. *Id.* Nevertheless, the state court held that a remand was necessary in order to determine whether the civil penalty imposed on defendant was intended to be punitive. *Id.*, 145 *N.J.* at 584-585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-7a. If it was determined that the intent of the State and the court at the time the penalty was imposed was to punish defendant, then double jeopardy would bar the subsequent criminal prosecution, notwithstanding that the statutory fixed-penalty was not disproportionate to the costs and damages incurred by the government in the civil proceedings. *Id.*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-7a.

The state court came to this far-reaching conclusion in response to the language in *Halper* which directs the lower courts to evaluate "the purposes actually served by the sanction in question" in determining whether a particular civil sanction constitutes criminal punishment and thus triggers double jeopardy protection. *State v. Womack*, 145 *N.J.* at 582, 679 *A.*2d at 609; App. A, *infra*, p.5a. The consent order in the civil matter differentiated between the $3,554.07 in

investigative costs and the $5,000 in civil penalties. App. G, *infra*, at pp. 47a-49a.[4] The state court found that the $5,000 penalty was not disproportionate to the government's costs and damages but stopped short of finding the penalty remedial because of the "labels" used in the civil judgment. *Womack*, 145 *N.J.* at 583-585, 679 *A.*2d at 609-610; App. A, *infra*, pp.6a-7a. As this Court recognized in *Halper* and *Kurth Ranch*, the labels attached to a particular sanction are not of paramount importance and do not control in a double jeopardy inquiry. *Halper*, 490 *U.S.* at 447-448; *Kurth Ranch*, 114 *S.Ct.* at 1945.

In *United States v. Morgan*, 51 *F.*3d 1105 (2d Cir.), *cert. denied* ___ *U.S.* ___, 116 *S.Ct.* 171 (1995), the United States Court of Appeals for the Second Circuit rejected an argument that a civil consent judgment constituted punishment because it divided the remedial and retributive penalties into two separate categories. *Id.* at 1115. The Second Circuit discounted the importance of a label and correctly applied a proportionality analysis to the civil sanction, finding that the what the government in actuality suffered in damages and expenses was not so divorced from the civil sanction as to constitute punishment. *Id.*

The New Jersey supreme court, rather than follow the approach of the Second Circuit and apply a proportionality analysis to ascertain the remedial nature of the civil sanction, instead decided that a remand was necessary to determine the intent of the government and the court at the time the civil penalty was imposed. *Womack*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-7a. If it was the intent of the State

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[4]It appears that the civil consent order separated "investigative costs" from other "civil penalties" because of the way the Medical Practices Act is structured. App. K, *infra*, pp.52a-53a.

and the court to punish defendant, then double jeopardy would bar the subsequent criminal prosecution, notwithstanding the proportionality of the civil penalty to the government's costs and damages. *Id.*

In reaching this conclusion, the state court replaced the objective test for determining the purposes actually served by the civil sanction with one that focuses on the subjective intent of the government and the court. See *Halper*, 490 *U.S.* at 447 n.7. (Whether a sanction constitutes punishment is not determined from the defendant's perspective because "even remedial sanctions carry the sting of punishment"). As stated by Justice Kennedy in his concurring opinion in *Halper*,

> Today's holding . . . constitutes an objective rule that is grounded in the nature of the sanction and the facts of the particular case. It does not authorize courts to undertake a broad inquiry into the subjective purposes that may be thought to be behind a given judicial proceeding. . . . Such an inquiry would be amorphous and speculative, and would mire the courts in the quagmire of differentiating among the multiple purposes that underlie every proceeding, whether it be civil or criminal in name.

Id. at 453. Cf. *Whren v. United States*, ___ *U.S.* ___, 116 *S.Ct.* 1769, 1774 (1996) (subjective intentions play no role in Fourth Amendment probable cause analysis).

The decision of the New Jersey supreme court appears to be based upon a misconception that *Halper* set forth two tests for determining whether a civil penalty constitutes punishment for double jeopardy purposes. One test examines the proportionality of the civil penalty imposed in relation to the government's costs and damages in determining whether it rises to the level of punishment for double jeopardy protection. The second test looks to the intentions of the parties in imposing the penalty to determine if there was a punitive intent. *Womack*, 145 *N.J.* at 584-585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-7a. Thus, even if the civil penalty was rationally related and not disproportionate to the government's costs and damages, which should end the double jeopardy analysis under *Halper*, under the New Jersey supreme court's interpretation of *Halper* the civil penalty could still constitute punishment and bar the subsequent criminal proceedings if there was a punitive intent to the penalty. *Id.*

This case emphasizes the difficulty the state and federal courts are having in reconciling the explicit holding in *Halper* ("defendant who has already been punished in a criminal prosecution may not be subjected to additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution") with the conflicting dictum which precedes it ("civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment"). *Halper*, 490 *U.S.* at 448-449. See *S.E.C. v. Bilzerian*, 29 *F.*3d 689, 696 n.11, 308 *U.S. App. D.C.* 43, 50 n.11 (D.C. Cir. 1994); *Matter of C.M.J.*, 915 *P.*2d 62, 67 (Kan. 1996); *State v. Young*, 544 *N.W.*2d 808, 811 (Neb. 1996); *State v. Hanson*, 543 *N.W.*2d 84, 87-88 (Minn. 1996); *State v. Hansen*, 542 *N.W.*2d 424, 432 (Neb. 1996); *State v.*

Hickam, 668 *A.*2d 1321, 1325-1327 (Conn. 1995); *State v. Carpenter*, 541 *N.W.*2d 105, 110 (Wis. 1995); *State v. Jones*, 666 *A.*2d 128, 141 (Md. 1995); *Moser v. Richmond County Bd. of Com'rs*, 428 *S.E.*2d 71, 73 (Ga. 1993). Supreme Court precedent does not provide clear guidance on this issue because this Court applied the "solely remedial" test in *United States v. Austin*, 509 *U.S.* 602, ___, 113 *S.Ct.* 2801, 2806 (1993), and the "solely deterrent/retribution" test in *Kurth Ranch*, 114 *S.Ct.* at 1945. This Court's recent opinion in *Ursery*, 116 *S.Ct.* at 2145 n.2, indicates that different views on this subject exist among the members of the Court. See *Ursery*, 116 *S.Ct.* at 2152-2163 (Stevens, J., concurring/dissenting).

The opinion of the New Jersey supreme court in this case will affect how other states address the double jeopardy concerns raised in light of *Halper*. Similar issues have been raised in other states with differing results and dissenting opinions. The Supreme Court of New Jersey is a respected court whose opinions carry authoritative weight which are often considered by other courts looking for guidance in analyzing difficult issues. The situation presented in *Womack* was not the "rare case" envisioned by this Court in the *Halper* opinion; nevertheless, a double jeopardy violation was established by the imposition of an ordinary single fixed-penalty which was not disproportionate to the government's costs and damages. See *Halper*, 490 *U.S.* at 449. The opinion of the New Jersey supreme court will serve only to further complicate and confuse the double jeopardy analysis under *Halper*. This Court's review is necessary to provide guidance to the lower courts, which are struggling with the ramifications of the *Halper* opinion with increasing frequency and conflicting results.

B. Defendant Was Not Placed In "Jeopardy" As A Result Of The Consumer Affairs Proceeding; Therefore The Double Jeopardy Clause Did Not Bar His Subsequent Criminal Prosecution.

In this case, the civil consumer affairs proceeding against defendant for unlicensed practice of medicine preceded his criminal prosecution for practicing medicine without a license. The New Jersey supreme court, like the majority of jurisdictions which have considered the question, determined that the order of the criminal and civil proceedings was not material in determining whether Double Jeopardy protections were applicable.[5] *Womack*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra*, pp.7a-8a. This case gives the Court the opportunity to address a question left unresolved in *United States v. Ursery*, ___ *U.S.* ___, 116 *S.Ct.* 2140 n.1 (1996), regarding whether the order of the criminal and civil proceedings has any significance in the double jeopardy analysis and the appropriate remedy for any violation.

In *Halper*, the criminal prosecution preceded the civil proceedings; thus there was no question that jeopardy attached once the criminal action commenced. In this case, however, the order of the proceedings was the reverse from *Halper* in that the civil action preceded the criminal prosecution.

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[5]*United States v. Morgan*, 51 *F.*3d 1105, 1113 (2d Cir.) *cert. denied*, ___ *U.S.* ___, 116 *S.Ct.* 171 (1995); *United States v. Furlett*, 974 *F.*2d 839, 843 n.2 (7th Cir. 1992); *United States v. Sanchez-Escareno*, 950 *F.*2d 193, 200 (5th Cir. 1991), *cert. denied*, 506 *U.S.* 841 (1992); *United States v. Walker*, 940 *F.*2d 442 (9th Cir. 1991); *United States v. Bizzell*, 921 *F.*2d 263 (10th Cir. 1990); *United States v. Mayers*, 897 *F.*2d 1126, 1127 (11th Cir.), *cert. denied* 498 *U.S.* 865 (1990).

Defendant was not placed in "jeopardy" when the Department of Consumer Affairs sought injunctive relief against him for practicing medicine without a license. Since defendant was not previously placed in jeopardy for prosecution purposes, there should have been no bar to a subsequent criminal prosecution.

Indeed, it must be emphasized that the *Halper* opinion is based upon the multiple punishment protection of the double jeopardy clause, not the multiple prosecution bar. In cases where the civil proceedings precede the criminal, the *Halper* multiple punishment prohibition should not prevent the criminal prosecution from going forward. It is premature to dismiss a criminal indictment which follows a civil proceeding because at that point the defendant has not been subject to multiple punishment under *Halper*. If the defendant is acquitted, then the multiple punishment issue is moot. If a conviction results, then the multiple punishment issue can be resolved prior to sentencing by a *Halper* proportionality determination. Thus, in cases where criminal indictments follow civil proceedings any motion to bar the criminal proceedings on *Halper* double jeopardy grounds should not be cognizable until after the criminal process has resulted in a conviction. This method of analysis will limit the number of interlocutory appeals on the *Halper* double jeopardy issue.

In this case, while the state court dismissed the criminal indictment on double jeopardy grounds, it further indicated that the indictment could be reinstated if the punitive portion of the civil judgment was returned to defendant. *Womack*, 145 *N.J.* at 585, 679 *A.*2d at 610; App. A, *infra, p.8a.* Since the state court found that the civil penalty was not disproportionate under *Halper*, the indictment could be reinstated only if it was determined that the government and the court had no intent to punish defendant when the civil

consent judgment was entered. *State v. Womack*, 145 *N.J.* at 584-585, 679 *A.*2d at 610; App. A, *infra*, pp.6a-9a. If there was a punitive intent to the $5,000 penalty, then the criminal prosecution could proceed only if the $5,000 was returned to defendant. *Id.*, 145 *N.J.* at 585-586, 679 *A.*2d at 610-611; App. A, *infra*, pp.8a-9a.

This case offers the Court the opportunity to address this recurring issue left unresolved in *Ursery* and provide needed guidance to the lower courts.

CONCLUSION

For the foregoing reasons, petitioner requests that the petition for a writ of *certiorari* be granted.

Respectfully submitted,

PETER VERNIERO
Attorney General of New Jersey
Attorney for Petitioner

CAROL M. HENDERSON
Deputy Attorney General
Attorney of Record

DATED: October 22, 1996

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-89/146 September Term 1995

STATE OF NEW JERSEY,

Plaintiff-Respondent
and Cross-Appellant,

V.

ERIC WOMACK,

Defendant-Appellant
and Cross-Respondent.

Argued March 25, 1996 Decided July 25, 1996

On certification to the Superior Court, Appellate Division.

Steven H. Gifis argued the cause for appellant and cross-respondent (Mr. Gifis, attorney; Mr. Gifis and Susan J. Abraham, on the brief).

Jane Deaterly Plaisted, Assistant Prosecutor, argued the cause for respondent and cross-appellant (Clifford J. Minor, Essex County Prosecutor, attorney).

Bennett A. Barlyn, Deputy Attorney General, argued the cause for amicus curiae, Attorney General of New Jersey (Deborah T. Poritz, Attorney General, attorney).

The opinion of the Court was delivered by

HANDLER, J.

The Enforcement Bureau of the Division of Consumer Affairs, acting on a complaint it had received, sent an agent to defendant's business to investigate whether defendant was holding himself out as a medical doctor and practicing medicine without a license. Based on the evidence obtained by the investigator, the Attorney General filed a civil action seeking to enjoin defendant's activities and to impose a civil sanction. The Division of Consumer Affairs also filed a criminal complaint.

This appeal presents two issues: (1) whether a civil fine that specifically imposes a "penalty" and also assesses an amount for reimbursing the government for its costs constitutes punishment under the Double Jeopardy Clauses of the New Jersey and the United States Constitutions; and (2) whether the failure of the prosecutor to disclose to the grand jury exculpatory information warrants dismissal of all or part of the criminal indictment.

I

On May 18, 1993, based on a complaint, an undercover investigator employed by the Enforcement Bureau of the Division of Consumer Affairs, visited the "Christian Health Institute and Wellness Center" to undertake an investigation of defendant Eric Womack. The agent professed to be a patient. After signing a disclaimer and an authorization form, and submitting urine, hair, and saliva samples, the agent was led into an examination room where he met defendant. The investigator informed defendant, who introduced himself as "an N.D.," a Naturopathic Doctor, that he had rectal bleeding.

Defendant examined and diagnosed the investigator. He poked the agent in the stomach with a pencil and simultaneously pushed down on the agent's outstretched arms. He shined a light in the investigator's eyes and electrically shocked his stomach. Using an instrument that looked and operated exactly like a ball point pen, defendant stung the agent's hand. From those tests, defendant concluded that the investigator had a clogged colon, weak kidneys, and aluminum in his body. Defendant warned the investigator that those conditions could lead to rectal cancer, and he advised him to schedule another visit. Defendant charged the investigator $300 for this visit.

During the follow-up visit, defendant advised the investigator that he needed to watch his diet if he hoped to unclog his colon and stop the rectal bleeding. Specifically, defendant recommended that the agent stop ingesting toxins and take certain vitamins and dietary supplements. The investigator purchased three of the $265 worth of recommended dietary products: "Temple Inner Cleanser," "Swedish Elixir," and "Agape Formula #1."

Based on the investigator's report, the Attorney General's office filed a civil complaint in the Superior Court, Chancery Division, charging Eric Womack with the unlicensed practice of medicine in violation of the Medical Practices Act, *N.J.S.A.* 45:9-18 and -22. Two days after the Attorney General filed the civil complaint, the Division of Consumer Affairs filed a criminal complaint also charging defendant with the unauthorized practice of medicine based on the same conduct.

The Attorney General sought and obtained in the civil action an injunction against defendant, pursuant to *N.J.S.A.* 45:1-25, whereby defendant was permitted to continue operating the Wellness Center so long as he abided by certain restrictions and not practice medicine. On November 16, 1993, the civil action was settled through a consent order entered by the Superior Court, Chancery Division, and pursuant to which defendant agreed to abide by the conditions of the permanent injunction. Furthermore, defendant agreed to "pay to the State of New Jersey the sum of $5,000.00 in

civil penalties and $3,554.07 in investigative costs, plus interest . . . ."

One week after the civil action was settled, the Essex County prosecutor took defendant's criminal case to a grand jury. The Enforcement Bureau investigator was the only witness called to testify, but his testimony was sufficient. On December 2, 1993, the grand jury returned an indictment charging defendant with one count of practicing medicine without a license in the third degree. *N.J.S.A.* 2C:21-20.

Prior to trial on the criminal indictment, defendant moved to dismiss the indictment. He asserted that the prosecution was violative of the Double Jeopardy Clause and he also alleged that the prosecutor's actions before the grand jury amounted to misconduct because the prosecutor misled the grand jury and failed to disclose certain information helpful to defendant. The Superior Court, Law Division agreed in part and dismissed the criminal indictment against defendant on double jeopardy grounds. The Appellate Division reversed finding no double jeopardy bar to the prosecution, but it dismissed without prejudice part of the indictment because of the State's misconduct in failing to disclose to the grand jury information that directly refuted the investigator's testimony. Defendant appealed and the State cross-appealed from the Appellate Division's ruling. This Court granted the petition, 142 *N.J.* 515 (1995), and the cross-petition, 143 *N.J.* 330 (1996), for certification.

II

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution protects against three harms: re-prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 *U.S.* 711, 717, 89 *S. Ct.* 2072, 2076, 23 *L. Ed.* 2d 656, 664-65 (1969). Although the language of the New Jersey Constitution simply provides that "No person shall, after acquittal, be tried for

the same offense," *N.J. Const.* art. I, ¶ 11, this protection is at a minimum co-extensive with that of the United States Constitution. *State v. Churchdale Leasing, Inc.*, 115 *N.J.* 83, 107-08 (1989).

The protection against multiple punishments may be implicated by a civil penalty following a criminal penalty if the civil sanction is levied in a separate proceeding, is based on the same conduct, and is punitive in nature. In weighing whether a civil fine is punitive, courts are directed to examine whether the fine can "fairly be characterized as remedial" or whether the fine serves "as a deterrent or retribution." *United States v. Halper*, 490 *U.S.* 435, 449, 109 *S. Ct.* 1892, 1902, 104 *L. Ed.* 2d 487, 502 (1989). In making that determination, courts must examine the "purposes actually served by the sanction in question." *Id.* at 447 n.7, 109 *S. Ct.* at 1901 n.7, 104 *L. Ed.* 2d at 501 n.7. They must also consider its impact. *Doe v. Poritz*, 142 *N.J.* 1, 46 (1995).

The purposes served by the civil sanction can be determined directly or indirectly. Sometimes, the purposes of the civil sanction can be determined indirectly by simply examining the fine levied. A fine that is overwhelmingly disproportionate to the damages the defendant has caused and the costs the State has incurred in prosecuting the action can be understood only as serving the punitive goals of deterrence and retribution. *Halper, supra*, 490 *U.S.* at 449, 109 *S. Ct.* at 1902, 104 *L. Ed.* 2d at 502; *Merin v. Maglaki*, 126 *N.J.* 430, 440-46 (1992). In other circumstances, however, the purposes of the civil sanction may be understood by the language and terms of the sanction itself and the expressed or revealed intentions of the parties in imposing the fine. A civil sanction that is imposed for punitive purposes, understood by the parties as being punitive, and is clear on its face that it is punitive, will be considered to be punitive even when the fine is not grossly disproportionate to the damages caused. *See Poritz, supra*, 142 *N.J.* at 54 ("[T]he purpose and the intent of the civil sanction is the touchstone that determines the sanction's characterization as either remedial or punitive, rather than simply its impact."); *cf. Halper, supra*, 490 *U.S.* at 448 n.8, 109 *S. Ct.* at 1902 n.8, 104 *L. Ed.* 2d

at 501 n.8 ("As the name indicates, punitive damages, available in civil cases, serve punitive goals."); *Poritz, supra*, 142 *N.J.* at 46 (finding that a law is held to impose punishment if either the legislature intended it to impose punishment or the impact of the legislative sanction is punitive).

A plain reading of the civil consent decree indicates that the civil fine may have been intended to be punitive. The civil fine assessed against Womack differentiated between penalties and costs. It included an amount of "civil penalties" and an amount of "investigative costs." A rational understanding of the phrase "civil penalties," when contrasted with the term "investigative costs," is that the sanction is an amount levied as a punitive fine separate from that necessary to reimburse the State.

Furthermore, the record indicates that the State understood, and therefore intended, the fine to be punitive. Although the prosecutor's concession at oral argument below that the fine was punitive is not dispositive of the issue, the concession indicates that, at the very least, the prosecutor understood the sanction to have a punitive purpose.

On the other hand, the amount of the fine indicates that the purpose may have been merely remedial. Its impact, as such, does not appear to be punitive. Certainly, had the civil penalty been imposed as a single and indivisible lump-sum fine, and not been divided into two parts labelled "civil penalty" and "investigative costs," upon an appropriate showing by the State, the *Halper* standard would support a finding that the fine was simply remedial in nature. As the State points out, the total amount assessed against defendant was less than the full costs of prosecuting the action. No further examination of the actual costs underlying the action is even necessary given the fact that the fine does not approach the grossly disproportionate level and is rationally related to the costs necessary to compensate the State. *Merin v. Maglaki, supra*, 126 *N.J.* at 444-45. However, if the fine when levied was intended as a civil penalty with both remedial and punitive aspects, as the plain language indicates, then the fact that the State could have

legitimately assessed an equal or greater amount as costs of prosecution is not material. A post-hoc explanation does not alter the nature or purpose of the fine when imposed.

Conclusive evidence of the purpose and intent of the parties at the time the fine was imposed cannot be gleaned from the current record. Although the civil sanction here is clearly not grossly disproportionate to the costs the State has incurred in prosecuting this action, the record reflects sufficient ambiguity on the intention of the parties in imposing the penalty to warrant remanding the action for a determination of whether the intention of the fine was punitive. *See Halper, supra*, 490 *U.S.* at 450, 109 *S. Ct.* at 1902-03, 104 *L. Ed.* 2d at 502-03 (remanding to permit trial court to determine the size of a remedial civil sanction); *State v. Ciba-Geigy Corp.*, 253 *N.J. Super.* 51, 60 (App. Div. 1992) (same). If it is clear that the intent of the State and the court at the time the fine was imposed was to punish defendant, then double jeopardy would bar this criminal action.

The State argues that even if the civil fine was punitive there is no bar to this action because the Double Jeopardy Clause bars only civil prosecutions after criminal penalties, not criminal prosecutions after civil penalties. *Halper* itself was concerned only with a civil penalty following a criminal trial. The United States Supreme Court has not decided this issue. *See United States v. Ursery*, ___ *U.S.* ___ n.1, 116 *S. Ct.* 2135, 2140 n.1, 135 *L. Ed.* 2d 549, ___ n.1 (1996). We, however, add our voice to the weight of authorities in determining that the order of the prosecutions is not material. *See, e.g., United States v. Ursery*, 59 *F.3d* 568, 571-75 (6th Cir. 1995), *rev'd on other grounds*, ___ *U.S.* ___, 116 *S. Ct.* 2135, 135 *L. Ed.* 2d 549 (1996); *United States v. Furlett*, 974 *F.2d* 839, 843 n.2 (7th Cir. 1992); *United States v. Sanchez-Escareno*, 950 *F.2d* 193, 200 (5th Cir. 1991), *cert. denied*, 506 *U.S.* 841, 113 *S. Ct.* 123, 121 *L. Ed.* 2d 78 (1992); *United States v. Walker*, 940 *F.2d* 442 (9th Cir. 1991); *United States v. Bizzell*, 921 *F.2d* 263 (10th Cir. 1990); *United States v. Mayers*, 897 *F.2d* 1126, 1127 (11th Cir.), *cert. denied*, 498 *U.S.* 879, 111 *S. Ct.* 178, 112 *L. Ed.* 2d 142 (1990); *United States v. Marcus Schloss & Co.*, 724 *F.*

Supp. 1123 (S.D.N.Y. 1989).

In any event, even if the remand establishes that the penalty imposed on defendant was intended to be punitive, the State may still be able to avoid the double jeopardy bar. The State, if it can return the punitive portion of the civil fine, would no longer be barred from proceeding with the criminal action. Even if we were to determine that the $5,000 was a punitive fine, we could not now vacate the civil award because the civil action is not properly before us. Depending on the results of the remand, the State may seek to reconsider the $5,000 penalty imposed in the civil action. If the State is able to return to the trial court that entered the judgment and alter or amend the consent judgment so as to eliminate the punitive portion of the civil penalty and if the State returns that portion to defendant, the double jeopardy bar to this action would be lifted.

The rules governing civil practice provide a mechanism whereby a party may be relieved from a final judgment or order for "any . . . reason justifying relief from the operation of the judgment or order." *R.* 4:50-1(f). A motion made pursuant to this rule must be made within a reasonable time, but no specific limit is placed on when it may be brought. *R.* 4:50-2. Although the boundaries of this doctrine are "as expansive as the need to achieve equity and justice," the application of this rule is limited to "exceptional situations." *Court Inv. Co. v. Perillo*, 48 *N.J.* 334, 341 (1966); *see also Housing Auth. v. Little*, 135 *N.J.* 274, 289 (1994) ("[T]he Rule is designed to provide relief from judgments in situations in which, were it not applied, a grave injustice would occur."). This may well constitute an exceptional circumstance, although that determination is left to the sound discretion of the trial court. *See*, *Perillo*, *supra*, 48 *N.J.* at 341.

In sum, the language of the order imposing the fine on defendant indicates that the fine may have been intended to be punitive in nature. A remand is required to permit the trial court to determine whether the fine was punitive or remedial. However, no further exploration of the total investigative costs is necessary and therefore the State's motion to expand the record on appeal to

support that assertion is denied.

If the civil fine is found to have a punitive purpose, and the State is unable to amend the civil judgment and return the punitive portion of that judgment to defendant, the State will be barred by the Double Jeopardy Clause from subjecting defendant to a criminal prosecution for this same conduct.

III

Because the State may be able to correct the double jeopardy problem, we take this opportunity to address the second issue in this action -- whether the indictment should be dismissed due to the prosecutor's actions before the grand jury in not disclosing certain information.

On November 23, 1993, the State sought to indict Womack for the unauthorized practice of medicine. The investigator was the sole witness before the grand jury. His testimony was inaccurate and incomplete. First, he testified that defendant prescribed vitamins, dietary supplements, and "things of that nature" to him. In fact, defendant did not issue him a prescription; rather, defendant recommended he purchase several over-the-counter items. Second, in response to a grand juror's question about whether defendant held any professional degrees or even a bachelor of arts degree, the investigator testified that to his knowledge defendant did not have any. Defendant not only has a bachelor's degree in religion, he has also received a Doctor of Divinity degree and a Doctor of Theology degree.

In addition to complaining about how the investigator misinformed the grand jury, defendant also complains that the prosecutor failed to present certain exculpatory information to the jurors. Defendant argues that the grand jury should have been informed that the agent was aware that defendant was not a medical doctor. The investigator signed an authorization form regarding "The Status Of Dr. Eric Womack, N.D." That form noted that defendant was a "naturopath" whose teachings were not "for the

purpose of Diagnosing, mitigating, treating or caring for disease." Indeed, the form stated that diagnosis "of any kind for any disease" is not covered by defendant's practice. The agent was advised that he was "not to act on [Womack's] advice" until he was examined by a licensed medical doctor. Moreover, the forms stated that the service provided "is not a substitute for medical treatment" and is "not yet approved by the medical profession." The investigator agreed to "always seek medical advise [sic] for medical treatment."

We recently had the opportunity to determine when a prosecutor is required to submit exculpatory information to a grand jury. In *State v. Hogan*, 144 *N.J.* 216 (1996), the Court was faced with a situation in which the sole witness to a crime recanted and then reinstated her account. The prosecutor refused defendant's request to inform the grand jury about the recantation. Noting that a grand jury "'indictment should be disturbed only on the clearest and plainest ground,'" *id.* at 228 (quoting *State v. Perry*, 124 *N.J.* 128, 168 (1991)) (internal quotation omitted), the Court ruled that "the State may not deceive the grand jury or present its evidence in a way that is tantamount to telling the grand jury a 'half-truth.'" *Id.* at 236. Therefore, "evidence that is credible, material, and so clearly exculpatory as to induce a rational grand juror to conclude that the State has not made out a *prima facie* case against the accused" must be presented to the grand jury. *Ibid.* The evidence "must directly negate guilt and also be clearly exculpatory." *Id.* at 237. Thus, the only evidence that need be submitted is evidence that "squarely refutes an element of the crime in question" and is reliable within the context of the evidence. *Ibid.* In addition, the prosecutor must have actual knowledge of the clearly exculpatory evidence. *Id.* at 238. The recantation was held to be unreliable and not clearly exculpatory. *Id.* at 239-40.

Under these rigorous standards, much of the information complained of did not have to be submitted to the grand jury. There is no evidence that the prosecutor knew that Womack had two doctorate degrees and, therefore, we need not consider whether that information was clearly exculpatory and negates an element of the offense. Although there is evidence that the prosecutor knew

Womack was a naturopath who was educated in Washington State, this information is not clearly exculpatory. Although imprecise, the investigator's testimony that defendant prescribed him dietary supplements is not clearly misleading; even suggesting taking vitamins and dietary supplements can, in certain circumstances, constitute the practice of medicine.

More difficult is the claim that the prosecutor was required to inform the grand jury that the investigator viewed documents indicating defendant was not a medical doctor. Defendant was charged with one count of practicing medicine without a license in the third degree. The statute provides that one is guilty of the offense when the person does not possess a medical license and either "engages in that practice," *N.J.S.A.* 2C:21-20a, or "holds himself out to the public or any person as being eligible to engage in that practice." *N.J.S.A.* 2C:21-20c. Defendant was charged with both alternative portions of the statute.

The fact that defendant may have informed the investigator through the authorization forms that he was not a medical doctor does not refute any element of the offense of engaging in the practice of medicine. If defendant was engaging in the practice of medicine, the fact that he may have told the investigator that he was not a medical doctor is simply immaterial.

That evidence, however, is highly probative on the alternative basis of the charge -- holding oneself out as a medical doctor. The evidence that defendant disclosed his professional status as a doctor of naturopathy and not a medical doctor flatly contradicts the principal element of that charge. Furthermore, the evidence, which was clearly known to the principle investigating agent, is properly considered to be within the knowledge of the prosecutor. *See Kyles v. Whitley*, ___ *U.S.* ___, ___, 115 *S. Ct.* 1555, 1567-68, 131 *L. Ed.* 2d 490, 508-09 (1995) (imputing knowledge to prosecutor of *Brady* material known by police officer); *State v. Landano*, 271 *N.J. Super.* 1, 37 (App. Div.), *certif. denied*, 137 *N.J.* 164 (1994); *State v. Engel*, 249 *N.J. Super.* 336, 396 (App. Div.), *certif. denied*, 130 *N.J.* 393 (1991). Because the evidence was clearly exculpatory,

highly reliable, and known by the prosecutor, that evidence should have been submitted to the grand jury. The failure to do so requires dismissal of that portion of the indictment.

IV

In sum, defendant cannot currently be tried on the criminal indictment in this action because of the potential double jeopardy bar derived from the civil penalty levied against him for the same conduct. If the State cures the double jeopardy bar, by either prevailing in the remanded proceeding or by revising the civil judgment and returning the punitive portion of civil fine, the criminal trial of defendant may proceed. However, the portion of the indictment charging defendant with holding himself out as a medical doctor is dismissed without prejudice because of the State's failure to present clearly exculpatory evidence to the grand jury.

The State's motion to expand the record is denied, the judgment of the Appellate Division is affirmed in part and reversed in part, and the action is remanded to the Law Division for proceedings consistent with this opinion.

JUSTICES POLLOCK, O'HERN, GARIBALDI, STEIN, AND COLEMAN join in JUSTICE HANDLER'S opinion.

SUPREME COURT OF NEW JERSEY
No. A-89/146 September Term 1995

ON APPEAL FROM _____

ON CERTIFICATION TO Appellate Division, Superior Court

STATE OF NEW JERSEY,

Plaintiff-Respondent,
and Cross-Appellant,

v.

ERIC WOMAK,

Defendant-Appellant
and Cross-Respondent.

DECIDED July 25, 1996
Justice Handler Presiding
OPINION BY Justice Handler
CONCURRING OPINION BY _____
DISSENTING OPINION BY _____

CHECKLIST	AFFIRM IN PART; REVERSE IN PART; REMAND	
JUSTICE HANDLER	X	
JUSTICE POLLOCK	X	
JUSTICE O'HERN	X	
JUSTICE GARIBALDI	X	
JUSTICE STEIN	X	
JUSTICE COLEMAN	X	
TOTALS	6	

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1047-94T2

STATE OF NEW JERSEY,

Plaintiff-Appellant/
Cross-Respondent,

v.

ERIC WOMACK,

Defendant-Respondent/
Cross-Appellant.

Argued April 26, 1995 - Decided MAY 15 1995

Before Judges Shebell, Skillman and Kleiner.

On appeal from the Superior Court of New Jersey, Law Division, Essex County.

Jane Deaterly Plaisted, Assistant Prosecutor, argued the cause for appellant/cross-respondent (Clifford J. Minor, Essex County Prosecutor, attorney; Ms. Plaisted, of counsel, and on the brief).

Susan J. Abraham argued the cause for respondent/cross-appellant (Steven H. Gifis, attorney; Ms. Abraham, on the brief).

PER CURIAM

The State appeals the dismissal on double jeopardy grounds of an indictment which charged defendant, Eric Womack, with one count of third degree practicing medicine without a license contrary to *N.J.S.A.* 2C:21-20. Defendant cross-appeals that portion of the order which denied dismissal of the indictment on alternative grounds.

On or about June 15, 1993, the State filed a verified complaint charging that defendant being unlicensed to practice, as required by the Medical Practices Act, *N.J.S.A.* 45:9-1 *et seq.*, offered and attempted to treat serious illnesses and ailments. The State sought an order enjoining defendant from engaging in the practice of medicine and a judgement for civil penalties and costs pursuant to *N.J.S.A.* 45:1-23 to 25. On June 15, 1993, an Order to Show Cause with temporary restraints was issued with a return date of June 25, 1993. On June 17, 1993, an investigator for the Division of Consumer Affairs filed a criminal complaint against defendant for a violation of *N.J.S.A.* 2C:21-20. On July 2, 1993, an Order Modifying Restraints was filed permanently restraining and enjoining defendant from engaging in the practice of medicine. Thereafter a Consent Order was filed which incorporated the provisions of the July 2, 1993 order and which imposed civil penalties and investigative costs.

On December 2, 1993, the Essex County Grand Jury returned indictment No. 4152-12-93, charging in one count that defendant "knowingly did not possess a license or permit to practice medicine while he engaged in that practice and/or held himself out to the public or any person as being eligible to engage in that practice contrary to the provisions of *N.J.S.A.* 2C:21-20, a crime of the Third Degree." Prior to trial, defendant moved before the Law Division, Essex County, to dismiss the indictment on the grounds that (1) the State's witness knowingly presented false testimony to the Grand Jury and the State failed to present crucial exculpatory information; (2) the indictment was barred by the Double Jeopardy Clause of the United States Constitution; and (3) the evidence

obtained through discovery did not support the indictment. Oral argument on defendant's motion was heard on September 23, 1994. The judge denied the motion on grounds (1) and (3), but granted the motion on ground (2), and dismissed the indictment with prejudice.

On October 27, 1994, the State filed a Notice of Appeal from the order dismissing the indictment. The defendant filed a Cross Notice of Appeal from the denial of dismissal on the additional basis of alleged false testimony presented to the grand jury.

It appears that defendant studied naturopathy for three years at Clayton School of Natural Healing in Alabama. Naturopathy is defined by *Gould's Medical Dictionary* 922 (3d. Ed. 1934) as:

> A school of healing which employs air, light, water, vibration, heat, electricity, psychotherapy, dietetics and massage. It excludes the use of drugs, surgery, x-ray or radium.
>
> [*Id.*]

It also appears that defendant is a minister, having received a bachelor's degree in religion, and Doctor of Divinity and Doctor of Theology degrees.

In May and June 1993, defendant was investigated by the New Jersey Office of Consumer Affairs, Department of Law and Public Safety, Enforcement Bureau/Professional Boards. A Special Investigator, posing as a patient named Kyle Bacon, visited defendant's office on May 18, 1993 and June 2, 1993. The office is located within a building titled Christian Health Institute and Wellness Center. Upon entering the office and reporting to the receptionist, the investigator paid $300.00 in cash before the examination.

On the first visit, the investigator received several

questionnaires and documents to read and sign. One of these documents states in pertinent part:

> I further request advice on diet and supplements to help improve my condition of health. I agree not to act on this advice until I have had an exam by a licensed medical doctor and received his evaluation and advice.

Another document, entitled "Contract of Authorization In the Dietary Health Analysis Procedure for Energy Evaluation," indicates that defendant is a holistic practitioner and states in pertinent part:

> I recognize that the Dietary Health Analysis Procedure is an established method that is not yet approved by the medical profession or the Food and Drug Administration, although it has not been rejected.
>
> I acknowledge that the Dietary Health Analysis Procedure, the Evaluation and the suggested Dietary Health Program are not for "DIAGNOSIS", Treatment, Care, Alleviation, Mitigation, Prevention, or care of any Disease of any kind or any way.

A third document, entitled, "The Status of Dr. Eric Womack, N.D.," marked "Please read carefully before signing," states in pertinent part:

> I am a Naturopath, Nutritional, Health Researcher, Practitioner and Consultant of Natural Health.... The lifestyle you learn and master is not a

substitute for medical treatment .... This is called Natural or Scientific Living. For any medical problem it is important that you have seen your physician and have had any medical treatment completed or underway.

* * *

In response to the above declaration, I agree that I will always seek medical advise for medical treatment.

* * *

I acknowledge that nothing in the teachings or methods of Natural Health or Life Science as taught by Dr. Eric Womack is for the purpose of Diagnosing, mitigating, treating or caring for disease in any way or manner whatever.

I clearly understand that "DIAGNOSIS" of any kind of any disease is outside the scope and practice of Natural Health and Life Science.

I do recognize the Natural Health and life Science is a Religious Science of Health.

I also clearly understand that all the Teachings and Methods of Natural health and live Science as administered by Dr. Eric Womack are for the sole purpose of assisting people to learn how to BUILD THEIR OWN HEALTH.

The investigator signed all three documents.[1]

Based on what transpired during the two office visits, the Attorney General filed its civil complaint against defendant on or about June 15, 1993. The Consent Order entered into between the defendant and the State, after a summary proceeding on June 24, 1993, provided in pertinent part:

> 2. Defendant Eric Womack shall pay to the State of New Jersey the sum of $5,000.00 in civil penalties and $3,554.07 in investigative costs, plus interest as provided by *R.* 4:42-11, for the offenses alleged in the complaint and for holding himself out as eligible to treat, offering to treat and actually treating persons not named in the Complaint for physical ailments and illnesses.

The fine and other costs were paid by defendant as per the order.

On November 23, 1993, the grand jury heard the testimony of the Special Investigator. The investigator testified that because of a consumer complaint there was an investigation into defendant's practice. He told the grand jury about the covert operation and that defendant performed numerous tests on him as a physician. The investigator told the grand jury that based on the signs in defendant's office that designated defendant as "Dr. Womack," and

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[1]The defendant indicates in his brief that these three documents were not included in the discovery provided by the State. However, all three were made part of the record below by defendant, and their authenticity was not contested by the State. The State at oral argument before this court represented that no copies of the documents were provided to its investigator and, therefore, it did not possess the documents when the case was presented to the grand jury.

the fact that defendant introduced himself as Dr. Womack, together with the way defendant treated him, he concluded that defendant was holding himself out as a medical doctor. He also testified that defendant "prescribed vitamins, supplements and things of that nature" for him, but that he kept the prescriptions and did not fill them. He testified that defendant was asked to produce a medical license, which he could not. He asserted that defendant did not give him and that he was not aware of any explanation or justification for defendant's practice. He also testified that defendant at no point during their encounter indicated that he was not a medical doctor and could not care for his problem.

Thereafter, a grand juror asked: "Do you have any knowledge [of] any other professional degree, license or anything that this individual may have?" The investigator answered: "I'm not familiar with him having anything of that nature." He testified that to his knowledge, defendant did not have any credentials. Based only on his testimony, on December 2, 1993 the grand jury returned its indictment against defendant.

At the argument on motion to dismiss, defendant contended that the State acted in bad faith because it settled the civil action and indicated that the defendant should not worry because he would probably get pre-trial intervention for the criminal case. Defendant further argued that it does not matter which proceeding came first, civil or criminal, because double jeopardy bars subsequent prosecution for the same offense. Further, it was a violation of fundamental fairness, and that it is double jeopardy as the State received a punitive fine as well as the investigative costs, thus the indictment should be dismissed with prejudice. Further, defendant asserted that the State put forward no other evidence that explained the use for which the penalty was imposed and that it was "clear that the $3,554.00 was to pay investigative costs, leaving the $5,000.00 to have no other purpose but to punish the defendant for doing something that he was not supposed to be doing as a naturopath."

Defendant also argued that the State failed to give all the

relevant information to the grand jury and failed to indicate that defendant was a naturopath and was allowed to continued to practice as a naturopath even after the settlement with certain limitations. He maintained that the State's witness gave false testimony when he answered "no" when questioned as to whether defendant had any other title, degree or was a therapist or practitioner, and that the State should have told the grand jury about the documents that explained that defendant is a naturopath and not a medical doctor. Defendant argued that all of this information was within the knowledge of the State and that all of the documents were a part of the civil proceedings, but the State failed to provide this "clearly" exculpatory evidence to the grand jury.

We consider first the State's appeal of the dismissal of the indictment based on double-jeopardy. The State asserts that the court erred in dismissing the indictment because the civil penalty did not constitute punishment and that in this case, unlike *United States v. Halper*, 490 *U.S.* 435, 109 *S.Ct.* 1892, 104 *L. Ed.* 2d 487 (1989), the civil penalty came before the criminal prosecution. The State further asserts that the case should be remanded so that the State can prove the penalty includes additional costs.

Defendant contends that the trial court properly dismissed the indictment as the civil penalty was a punishment irrespective of the fact that the civil proceeding came first. He further contends that the State should not be afforded a remand as the State was on notice, in light of case law, that any penalties imposed that exceeded State cost could be deemed punitive.

The judge, in holding that the double jeopardy clause required dismissal of the indictment with prejudice, based his ruling on *Halper*, *supra*, and *State v. Darby*, 246 *N.J. Super.* 432 (App. Div.), *certif. denied*, 126 *N.J.* 342 (1991). He concluded that it did not matter which proceeding came first, and that the focus should be on the whether the penalty was a punishment. The judge further stated:

In this case, the one before me, the

government specifically set forth in its judgment, in the consent judgment how much was for costs and how much was for civil penalties. The civil penalties we might note are three quarters of the maximum that could be imposed in the criminal case which is $7500 on the third degree crime which is what is alleged here.

* * * *

Well, if I agree with the Bizzell court and with the Marcus Schloss court and I agree with State v. Darby that it should not matter which case came first, that the focus -- proper focus should be on the question whether there was punishment or not, in the case such as this where the consent judgment specifically sets forth an amount of money for costs and expenses, $3,554.07, and then imposes an additional $5,000 in civil penalties, we have a situation different from any of the other cases in New Jersey. Where in the civil proceedings, the State simply obtain the civil penalty times some number of counts or some number of instances and there was no breakdown with regard to costs and expenses.

* * * *

But here where the State specifically separates its costs from the penalties, it is my view that what occurred in the Chancery Division, was in fact punishment and that, therefore, under

> Darby and Halper, the defendant cannot be further punished; and therefore, I will dismiss the indictment with prejudice.

The Double Jeopardy clause of the United States Constitution provides: "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb...." *U.S. Const.*, amend V. The United States Supreme Court has held many times that "the double jeopardy clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the some offense after conviction; and multiple punishments for the same offense." *Halper, supra*, 490 *U.S.* at 440, 109 *S. Ct.* at 1897, 104 *L. Ed.* 2d at 496 (emphasis added). "New Jersey's constitution expresses a coextensive guarantee, in different words." *Darby, supra*, 246 *N.J. Super.* at 438.

In *Halper, supra*, the Court set forth the standard for determining "whether and under what circumstances a civil penalty may constitute punishment for the purpose of the Double Jeopardy Clause." *Halper, supra*, 490 *U.S.* at 445, 109 *S. Ct.* at 1901, 104 *L. Ed.* 2d at 500-01. Halper, a manager of a medical laboratory was indicted on sixty-five counts of violating the criminal false claims statute, 18 *U.S.C.* § 287. *Id.* at 437-38, 109 *S. Ct.* at 1896, 104 *L. Ed.* 2d at 494-95. Halper was fined $5000 and sentenced to two years imprisonment. *Ibid.* The Government subsequently brought an action under the Federal Civil False Claims Act imposing a $130,000 civil penalty for committing a $585 fraud. *Ibid.*

In reviewing the case the Court stated that the sole issue was "whether the statutory penalty authorized by the civil False Claims Act, ... constitutes a second 'punishment' for the purpose of double jeopardy analysis." *Id.* at 441, 109 *S. Ct.* at 1898, 104 *L. Ed.* 2d at 497. The Court noted that the Double Jeopardy Clause "'prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.'" *Id.* at 442, 109 *S. Ct.* at 1898, 104 *L. Ed.* 2d at 498 (quoting *Helvering v. Mitchell*, 303 *U.S.* 391, 399, 58 *S. Ct.* 630, 633, 82 *L. Ed.* 917, 922 (1938)). The Court

went on and stated that:

> While the [*Mitchell, supra*] opinion makes clear that the Government may impose both a criminal and a civil sanction with respect to the same act or omission, and that whether a given sanction is criminal is a matter of statutory construction, it simply does not address the question we face today: whether a civil sanction, in application, may be so divorced from any remedial goal that it constitutes "punishment" for the purpose of double jeopardy analysis. If anything, Justice Brandeis' carefully crafted opinion for the Court intimates that a civil sanction may constitute punishment under some circumstances.... "[P]unishment" indeed may arise from either criminal or civil proceedings.
>
> [*Id.* at 443, 109 *S. Ct.* at 1899, 104 *L. Ed.* 2d at 498 (citations omitted).

See also Rex Trailer Co. v. United States, 350 *U.S.* 148, 76 *S. Ct.* 219, 100 *L. Ed.* 149 (1956); *United States ex rel Marcus v. Hess*, 317 *U.S.* 537, 63 *S. Ct.* 379, 87 *L. Ed.* 443 (1943).

The Court stated that the relevant teachings of *Mitchell, Rex Trailer*, and *Hess*, is that "the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, ... without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis. *Halper, supra*, 490 *U.S.* at 446, 109 *S. Ct.* at 1900, 104 *L. Ed.* 2d at 500.

The Court also noted that "the labels 'criminal' and 'civil' are not of paramount importance." The court stated that the standard

for determining whether a penalty is punitive in nature is:

> [W]hether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of [the purpose] the penalty may fairly be said to serve. Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment."
>
> [*Id.* at 447-448, 109 *S. Ct.* at 1901-02, 104 *L. Ed.* 2d at 501.]

The Court further declared:

> What we announce now is a rule for the rare case, the case such as the one before us, where a fixed-penalty provision subjects a prolific but small-guage offender to a sanction overwhelmingly disproportionate to the damages he has caused. The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears not rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.
>
> [*Id.* at 449, 109 *S. Ct.* at 1902, 104 *L. Ed.* 2d at

The court must determine, in light of the Government's cost, whether the penalty has crossed the line between remedy and punishment. *Id.* at 450, 109 *S. Ct.* at 1903, 104 *L. Ed.* 2d at 502-03; *see also Darby, supra*, 246 *N.J. Super.* at 444-45; *accord In Re Garay*, 89 *N.J.* 104 (1982).

In *Darby, supra*, we also dealt with the question of whether a civil penalty constituted punishment. *Darby, supra*, 246 *N.J. Super.* at 432. There, the State had filed a civil action against defendants in May 1986, charging them with violations of the Uniform Securities law. *Id.* at 436. An indictment was handed down in December 1986, based on the same offense. *Ibid.* On July 6, 1988, after a twenty day trial, defendants were found to have violated the Uniform Securities Laws and civil penalties in the amount of $128,600 were imposed against defendant Handy and $163,400 against the Darbys for a total of $292,000. *Id.* at 437. Defendants were also enjoined from any securities activities and their assets were retained. *Ibid.* A disgorgement order was also entered against defendants in the amount of $3.1 million. *Id.* at 437-38. Subsequently, defendants sought to dismiss the indictment as they claimed that they had already been punished by the judgement entered against them in the Chancery action. *Ibid.*

The State had submitted proof of $205,000 in time spent by the two attorney generals, plus time spent by securities bureau's personnel. *Id.* at 445. We concluded that the civil penalty in the amount of $292,000 was not so disproportionate to the State's costs as to constitute punishment. *Id.* at 446. We observed:

> Surely, the State gained no more than "rough remedial justice." It is of no consequence that the Chancery Division did not have the State's expense analysis before it. It is the objective relationship between the amount of the penalty and the Government's losses and expenses that

controls.

[*Ibid.*]

In *State v. Ciba-Geigy Corp.*, 253 *N.J. Super.* 51 (App. Div. 1992), the defendant moved to dismiss an indictment on Double Jeopardy grounds alleging that the penalty previously imposed in an administrative consent order of $1.45 million for the same offense was punitive and, therefore, barred criminal prosecution. *Id.* at 54-56. We held that the trial court erroneously concluded that defendant agreed that the civil penalty was remedial rather than penal in nature. *Id.* at 60. We remanded as it is the trial court's function to determine whether the penalty crosses the line between remedy and punishment. *Ibid. See Halper, supra*, 490 *U.S.* at 450, 109 *S. Ct.* at 1903, 104 *L. Ed.* 2d at 502. We further instructed the trial court to determine whether *Halper, supra*, applied since "the criminal prosecution came first followed by the civil proceedings imposing the civil penalty," which is the opposite situation in *Ciba-Geigy*. *Id.* at 62. We suggested that the trial court consider the holding in *United States v. Marcus Schloss & Co., Inc.*, 724 *F. Supp.* 1123 (S.D.N.Y. 1989), that: "If in fact a civil sanction may fairly be characterized 'only as a deterrent or retribution', then its exaction before imposition of the criminal punishment should have the same double jeopardy effect as exaction afterward." *Id.* at 1126 (citations omitted); *see also United States v. Bizzell*, 921 *F. 2d* 263 (10th Cir. 1990).

In *Merin v. Maglaki*, 126 *N.J.* 430, 440-41 (1992), the Court reaffirmed that "[t]he mere labelling of a penalty as 'civil,' however, does not foreclose an examination of whether in substance the penalty imposed is 'punishment' rather than 'remedial' in nature." *Id.* "Civil penalties, therefore, will not survive constitutional scrutiny in the 'stark situation' in which the States's recovery is 'exponentially greater than the amount of the fraud' and 'many times the amount of the Government's total loss.'" *Merin, supra*, 126 *N.J.* at 443 (quoting *Halper, supra*, 490 *U.S.* at 445, 109 *S. Ct.* at 1900, 104 *L. Ed.* 2d at 499). "However, a civil penalty does not rise to the level of 'punishment' for double-

jeopardy purposes merely because it can be imposed in an amount in excess of the Government's actual damages." *Merin, supra*, 126 *N.J.* at 442.

It must be recognized that it is difficult to give a precise accounting of costs in investigations and proceedings of this nature. *Id.* at 445. In *Merin*, the Commissioner sought $5000.00 in damages for each of the six violations of the Insurance Fraud Act. *Id.* at 444. The Court stated that it was not troubled by the fact that the State had not proven the exact extent of its damages and held that the amount sought, which was $30,000.00, is rationally related to the expenses incurred by the government in the course of its investigation and prosecution of the fraudulent claim. *Id.* at 444-45.

The Medical Practice Act (Act) sets forth civil penalties, however, it also provides that: "In any action brought pursuant to this act, a board or the court may order the payment of costs for the use of the State." *N.J.S.A.* 45:1-25. The fact that the statute itself makes separate provisions for costs and penalties may explain why in the consent order there was a separation of the two items. This, however, is not dispositive of the issue of whether the civil penalty was so disproportionate to the State's expenses as to constitute punishment only. We are convinced that in the present case, the record does not support a determination that the penalty crossed the line between remedy and punishment, nor is it many times the profit gained by defendant or the amount of the government loss. *Id.* at 443; *Halper, supra*, 490 *U.S.* at 450, 109 *S. Ct.* at 1903, 104 *L. Ed.* 2d at 502-03; *see also Ciba-Geigy*, 253 *N.J. Super.* at 60; *Darby, supra*, 246 *N.J. Super.* at 444-45.

The expenditures for the investigation of $3554.07 clearly does not represent the full cost to the State of proceeding to restrain defendant from the illegal practice of medicine and bring about final resolution of the matter in the Chancery Division. Further, it does not begin to suggest that the State would be gaining more than "rough remedial justice" so as to require a remand for an accounting of the State's actual costs in the civil action. We, therefore, reverse on this issue.

Turning to defendant's cross-appeal, the motion judge concluded that it was irrelevant that the defendant called himself a naturopath, because defendant's conduct was sufficient evidence of his practicing medicine without a license in violation of *N.J.S.A.* 2C:21-20. Although we agree with the judge's reasoning as far as it goes, we must point out that defendant was not charged only under *N.J.S.A.* 2C:21-20a, practicing without a license. He was alternatively charged in the single count of the indictment with a violation of subsection c of *N.J.S.A.* 2C:21-20, which prohibits even the holding out to the public that one is eligible to engage in the practice of medicine unless that person has a valid license or permit. We cannot agree that the withheld documents were irrelevant to the charge that defendant was holding himself out to be a medical doctor. A reading of the documents demonstrates that they were clearly relevant to refute that allegation.

The New Jersey Constitution guarantees a criminal defendant the right to indictment by grand jury. *N.J. Const.* art. I, ¶ 8. The Grand Jury has been regarded as a "primary security to the innocent against hasty, malicious and oppressive persecution." *Wood v. Georgia*, 370 *U.S.* 375, 390, 82 *S. Ct.* 1364, 1373, 8 *L. Ed.* 2d 569, 580 (1962). Its function is to stand between citizens and the State and to determine whether "a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." *Ibid.*

Although the United States Supreme Court has declined to exercise supervisory power over the grand jury, *United States v. Williams*, 504 *U.S* 36, 112 *S. Ct.* 1735, 118 *L. Ed.* 2d 352 (1992), our State Courts have recognized the need to exercise supervisory authority over the grand jury to ensure a fair and unbiased proceedings. *State v. Smith*, 269 *N.J. Super.* 86, 95 (App. Div. 1993), *certif. denied*, 137 *N.J.* 164 (1994). Thus, we will dismiss an indictment where the "prosecutor clearly infringes upon the grand jury's decision-making function." *Ibid. See State v. Hart*, 139 *N.J. Super.* 565, 567-68 (App. Div. 1976).

In *Smith, supra*, we held that "the prosecutor ... [has] an

obligation to present to the grand jury evidence in his or her possession that clearly negates a defendant's guilt." *Id.* at 92. We, of course, recognized that the prosecutor has broad discretion in presenting a matter to the grand jury, but the prosecutor must exercise that discretion in good faith. *Smith, supra*, 269 *N.J. Super.* at 92; *accord State v. Hogan*, ___ *N.J. Super.* ____ (App. Div. 1995); *State v. Gaughran*, 260 *N.J. Super.* 283, 287 (Law Div. 1992).

Although it can be argued in the case at bar that the documents are not "clearly exculpatory," it is clear that the documents were a direct refutation of the investigator's testimony that defendant did not reveal that he was not a medical doctor and that he constantly indicated that he was a medical doctor. Further, a grand juror demonstrated a direct interest in knowing whether there was any knowledge on the part of the investigator that defendant had any degrees or anything of that nature. Defendant was indicted for knowingly holding himself out as being eligible to engage in the practice of medicine. We cannot say that this alternative ground for charging defendant would not have been denied the State if the grand jury had reviewed the documents signed by the investigator.

The documents, as defendant claims, tend to show that he was not "holding himself out to the public or any person to be eligible" to practice medicine. *N.J.S.A.* 2C:21-20c. However, defendant's conduct does show that he was engaging in the practice of medicine when he dealt with the investigator. *N.J.S.A.* 2C:21-20a. We, therefore, will not dismiss the entire indictment, but we do strike the portion of it charging that defendant "held himself out to the public or any person as being eligible to engage in that practice." Our ruling is without prejudice to the State properly re-presenting the matter to a grand jury if it so desires.

We reverse the dismissal of the indictment on double jeopardy grounds. We re-instate only that portion of the indictment charging that defendant knowingly did not possess a license or permit to practice medicine while he engaged in that practice.

Reversed and remanded.

I hereby certify that the foregoing is a true copy of the original on file in my office.

R. Emille Cox
Clerk

APPENDIX C

4152-12-93

Superior Court of New Jersey

ESSEX COUNTY

(Law Division - Criminal)
1993 TERM

==========

THE STATE OF NEW JERSEY

vs.

ERIC WOMACK CT. 1

Defendant

==========

INDICTMENT 1 COUNT(S)

THIRD DEGREE PRACT. OF MEDICINE
W/O LICENSE

A True Bill

/s/ Ruth Bailey.....

RUTH BAILEY Forelady.

GRAND JURY NO:

========== 6031

Plea: P93005575

Bail: W628734

Presented: Dec. 2, 1993

==========

Essex County, to wit:

The Grand Jurors of the State of New Jersey, for the County of Essex, upon their oath present that

ERIC WOMACK

between on or about the 18th day of May, 1993 and June 2, 1993 at the Township of Bloomfield in the County of Essex aforesaid and within the jurisdiction of this Court, knowingly did not possess a license or permit to practice medicine while he engaged in that practice and/or held himself out to the public or any person as being eligible to engage in that practice contrary to the provisions of N.J.S. 2C:21-20, a crime of the Third Degree and against the peace of this State, the government and dignity of the same.

CLIFFORD J. MINOR
COUNTY PROSECUTOR

BY: /s/ DAVID DIAS
DAVID DIAS
ASSISTANT PROSECUTOR

APPENDIX D

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY
BY: James F. Lafargue and Joyce Brown
Deputy Attorneys General
124 Halsley Street
P.O. Box 45029
Newark, New Jersey 07102
Tel. (201) 648-3070

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: ESSEX COUNTY
DOCKET NO.

ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY and NEW JERSEY BOARD OF MEDICAL EXAMINERS,	CIVIL ACTION
Plaintiffs,	
V.	
ERIC WOMACK,	
Defendant.	VERIFIED COMPLAINT

Robert J. Del Tufo, Attorney General of New Jersey, by James F. Lafargue, Deputy Attorney General, with offices located at the Division of Law, Fifth Floor, 124 Halsey Street, Newark, New Jersey 07102, by way of Complaint, says:

COUNT ONE

1. The Attorney General of New Jersey, is charged with enforcing the laws of the State of New Jersey pursuant to *N.J.S.A.* 52:17A-4, and is empowered pursuant to *N.J.S.A.* 45:1-23 to bring summary proceedings to seek and obtain injunctive and other

appropriate relief in the Superior Court for violations of *N.J.S.A.* 45:9-6, prohibiting the unlicensed practice of medicine and surgery.

2. The New Jersey State Board of Medical Examiners is charged with the duty and responsibility of regulating the practice of medicine and surgery in the State of New Jersey pursuant to *N.J.S.A.* 45:91-1 *et seq.*, and *N.J.S.A.* 45:1-14 *et seq.* The Board is authorized to initiate proceedings to seek and obtain injunctive and other appropriate relief in the Superior Court for violations of any act, including but not limited to, the unlicensed practice of medicine pursuant to *N.J.S.A.* 45:1-23.

3. Defendant Eric Womack at all times relevant to this: complaint, was an individual doing business as "Dr. Eric Womack" at the address of 430 Franklin Street, Bloomfield, New Jersey.

4. Defendant Eric Womack is not presently nor has he ever been licensed to practice medicine in New Jersey pursuant to *N.J.S.A.* 45:9-8 *et seq.*, nor has he ever been authorized to hold himself out as a medical doctor. (See certification of Charles A. Janousek, Executive Director, New Jersey State Board of Medical Examiners, hereinafter referred to as Exhibit A).

5. On or about May 18, 1993, Defendant Eric Womack, undertook to treat a person using the name Kyle Bacon, an undercover investigator of the Department of Law and Public Safety, Division of Consumer Affairs, Enforcement Bureau/ Professional Boards, in his office located at 430 Franklin Street, Bloomfield, New Jersey. The investigator complained of rectal bleeding (see attached affidavit of Derrick Whitfield, hereinafter referred to as Exhibit B).

6. On that date, Defendant's receptionist requested a $300.00 cash payment from the investigator before the examination had been performed, which he provided, obtaining a receipt. The receptionist then took urine, hair, and saliva samples from the investigator (Exhibit B).

7. In the Defendant's waiting room, another individual identified as "Dr. Womack's secretary" then physically took the investigator's height, weight and blood pressure. She then purported to obtain the investigator's body fat content by applying small square sticky pads to the investigator's right hand and foot, connecting the pads by wires to a small square metal machine, and viewing a digital readout (Exhibit B).

8. Defendant then entered the examining room and identified himself to the investigator as "Dr. Womack", "N.D.", a Naturopathic Doctor. He also indicated to the investigator that the urine sample had blood within. (Exhibit B).

9. Defendant then tested the investigator with a "blood circulation mechanism", which was a hand-held instrument with a tip like that of a ball-point pen, which Defendant touched to each of the investigator's fingers. Defendant stated that when the instrument lighted, it indicated that the investigator had poor blood circulation.

10. Defendant then purported to perform a test of arm strength by applying pressure to each of the investigator's extended arms, while touching the investigator's abdomen with a pencil. When Defendant succeeded in pushing each of the investigator's arms down, he stated that the test showed that the investigator had a clogged colon and weak kidney.

11. Defendant then examined the investigator's eyes with a lighted instrument which he stated was "Iridology". He then grazed the investigator's stomach with an instrument that caused an electrical shock. He indicated that each of these tests revealed a clogged colon.

12. Defendant then applied an instrument to the investigator's hand which that caused a stinging sensation. As a result of this test, Defendant stated that the investigator had an excessive amount of aluminum in his body.

13. Defendant further told the investigator that his clogged colon and a weak kidney led to his rectal bleeding and could eventually cause cancer of the rectum. Defendant told the investigator to immediately provide him with a stool sample and to return for a second visit in two weeks. (Exhibit B)

14. On June 2, 1993, the same investigator returned to the office of Defendant, Eric Womack. Upon entering the office, the receptionist provided him with a pamphlet entitled "Living Well Natural Clinic". (See attached affidavit of Derrick Whitfield, hereinafter referred to as Exhibit C)

15. Next, the investigator entered the examining room where Defendant advised him that the lab report indicated blood in his urine and he requested a stool sample. He told the investigator to reorganize his diet as indicated in the "Living Well Natural Clinic" pamphlet. He also provided the investigator with a laboratory report entitled "Mineral Analysis Report" (Exhibit C).

16. Defendant reiterated that the clogging of the investigator's colon caused his rectal breeding and that it could the unclogged with his new diet and the supplements which Defendant would provide. Defendant then prescribed a number of vitamin supplements on a sheet entitled "Regimen Based on Analysis," told the investigator to take them for three weeks and then return for another visit (Exhibit C). The receptionist then priced the cost of all the vitamins and supplements prescribed at $265.00. The investigator, however, only purchased three items, named "Temple Inner Cleanser," "Swedish Elixir" and "Agape Formula at a cost of $74.00 (Exhibit C).

17. The aforementioned acts of Defendant constitute the practice of medicine without a license, contrary to *N.J.S.A.* 45:9-18 and 45:9-22, and could have endangered the life of the investigator/patient had he actually been suffering from the symptoms described, by inducing him not to obtain competent medical treatment.

WHEREFORE, the plaintiff respectfully demands that this Court grant:

(A) An order pursuant to *N.J.S.A.* 45:1-25 preliminarily and permanently enjoining Defendant from engaging in the unlicensed practice of medicine contrary to *N.J.S.A.* 45:9-18 and -22 and from purchasing, possessing, prescribing, distributing, endorsing or recommending any substances with the intent to attempt or claim to cure or alleviate any illness, disease, deformity or physical or mental condition, and granting immediate temporary restraints against such activity so as to prevent irreparable injury to members of the public with whom such transactions may otherwise take place.

(B) Judgement for civil penalties and costs for use of the State in accordance with *N.J.S.A.* 45:1-25.

(C) An Order directing defendant to permit access to his medical offices at 430 Franklin Street in Bloomflield, New Jersey for an inspection by the Attorney General or designated representatives, and impoundment pursuant to *N.J.S.A.* 45:1-18(f) of evidence of the unlicensed practice of medicine.

(D) Such other relief as the Court may deem appropriate and necessary in view of the established facts and the intent of the laws regulating the practice of medicine in the State of New Jersey.

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY

BY: /s/ James F. Lafargue

/s/ Joyce Brown
James F. Lafargue
Joyce Brown
Deputy Attorneys General

Dated: June 15, 1993

APPENDIX E

ROBERT J. DEL TUFO
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FILED

HARRY A. MARGOLIS
P.H. Ch

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.

ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY and NEW JERSEY BOARD OF MEDICAL EXAMINERS,	:	CIVIL ACTION
	:	ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS AND AND REQUIREMENT TO FILE ANSWER
Plaintiffs,	:	
V.	:	
ERIC WOMACK,	:	
Defendant.	:	

This matter being opened to the Court on the application of the Attorney General of New Jersey, by James F. Lafargue and Joyce Brown, Deputy Attorneys General, counsel for Plaintiff State of New Jersey Board of Medical Examiners, pursuant to *N.J.S.A.* 45:1-23 and *R.* 4:52-1, and it appearing from the complaint in this matter and affidavits filed herewith, that Defendant Eric Womack has violated *N.J.S.A.* 45:9-18 and 45:9-22, by offering to treat and actually treating a patient complaining of serious physical ailments, by dispensing substances purporting to relieve or cure those ailments, knowing that he had no license to do so, and it further

appearing that good cause exists for the entry of the within Order;

IT IS on this 15 day of June 1993,

ORDERED:

1. That Eric Womack shall show cause, after summary hearing, on June 25, 1993 at 1:45 p.m. or soon thereafter as counsel may be heard before the Honorable Harry A. Margolis, at Gibraltar Bldg 8th Floor, 153 Halsey Street, Newark, New Jersey, why an Order on that date should not be entered:

a. preliminarily enjoining defendant from engaging or offering to engage in the practice of medicine in the State of New Jersey without a license to do so;

b. preliminarily ordering the closing of his office located at 430 Franklin Street, Bloomfield, New Jersey, in such a manner that members of the public seeking medical or surgical care or services may not longer gain access to those portions of the buildings in which defendant maintains his practice, until and unless he is licensed to practice medicine by the Board of Medical Examiners; and

c. setting a date for final hearing by summary disposition.

2. That pending the return date set forth herein, defendant shall be hereby is temporarily enjoined and restrained from engaging in the practice of medicine and/or offering to engage in the practice of medicine at any place in the State of New Jersey. For the purpose of this Order, the practice of medicine shall be defined as any method of treatment of diagnosis of human ailment, disease, pain, injury, deformity, mental or physical condition.

3. That the Attorney General or such agents as he may designate shall be empowered to enter without notice upon any premises from which defendant conducts or has conducted the unlicensed practice of medicine and to immediately inspect, impound, seal and remove from defendant's office premises any evidence of the unlicensed practice of medicine subsequent to the date of this Order. Said evidence may include but shall not be limited to appointment logs, patient records, medications or other remedies, medical instruments and equipment, dispensing logs, payroll records, bills, receipts and financial records. Within 48 hours following impoundment of any materials as authorized herein, the Attorney General shall file with this court, and provide a copy to defendant, an inventory of all impounded items.

4. That Eric Womack personally provide access to each of his offices for the purpose of the above inspection and impoundments and shall be restrained and enjoined from interfering with such activity.

5. That defendant's office, located at 430 Franklin Street, Bloomfield, New Jersey shall be and hereby is closed in such a manner that members of the public seeking medical or surgical care or services may no longer gain access to those portions of the buildings in which defendant maintains his practice. Defendant shall take such steps as may be necessary to implement the closure ordered hereby.

6. That defendant, on seven days notice to the Attorney General, may move for dissolution of the restraints imposed within, and/or for such relief as may be necessary regarding any item impounded as authorized herein.

7. That a copy of this Order shall be securely and conspicuously posted on or near each access to defendant's offices at 430 Franklin Street, Bloomfield, New Jersey, in order to notify the public of the action ordered within.

8. That a copy of this Order be personally served upon Defendant within 4 days of its entry.

9. That defendant shall file with this court and serve on plaintiff a copy of his answer to the annexed complaint on or before 20 days of service of this order and the complaint therein.

AND TAKE FURTHER NOTICE that defendant Eric Womack shall by service of this Order be notified of his right to retain an attorney to represent him in this matter and that if he is unable to obtain an attorney, he may communicate with the New Jersey State Bar Association, 1 Constitution Square, New Brunswick, New Jersey, 08901, telephone (908) 249-5000, or the Lawyer Referral Service of the county of his residence or the county in which this action is pending. If he cannot afford an attorney, he may communicate with the Legal Services Office of the county of his residence or the county in which this action is pending. This notice is provided pursuant to *R.* 4-4-2.

/s/ Harry A. Margolis, J.S.C.

APPENDIX F

ROBERT J. DEL TUFO
ATTORNEY GENERAL OF NEW JERSEY
BY: James F. Lafargue and Joyce Brown
Deputy Attorneys General
Division of Law 5th Floor
124 Halsley Street
P.O. Box 45029
Newark, New Jersey 07101
Tel. (201) 648-3070

FILED
JULY 2, 1993
HARRY A. MARGOLIS
P.J. Ch

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: ESSEX COUNTY
DOCKET NO. C-153-93

ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY and NEW JERSEY BOARD OF MEDICAL EXAMINERS,	CIVIL ACTION
Plaintiffs,	ORDER MODIFYING RESTRAINTS
V.	
ERIC WOMACK,	
Defendant.	

This matter being opened to the Court on the application of the Attorney General of New Jersey, by James F. Lafargue and Joyce Brown, Deputy Attorneys General, counsel for Plaintiff State of New Jersey Board of Medical Examiners, pursuant to *N.J.S.A.* 45:1-23 and *R.* 4:52-1, and it appearing from the complaint in this matter and affidavits filed herewith, that Defendant Eric Womack has violated *N.J.S.A.* 45:9-18 and 45:9-22, by undertaking to diagnose and treat patients complaining of serious physical ailments, by dispensing substances purporting to relieve or cure those

ailments, knowing that he had no license to do so, and this matter having been heard in summary proceeding on June 24, 1993, Steven H. Gifis, Esq., appearing for Defendant, and the Court finding that good cause exists for the entry of the within Order;

IT IS on this 2nd day of July, 1993,

ORDERED that:

1. The Order to Show Cause is hereby discharged and said Order is hereby modified in its entirety as set forth below.

2. Defendant shall be and hereby is permanently enjoined and restrained from engaging in the practice of medicine and/or offering to engage in the practice of medicine at any place in the State of New Jersey. For the purpose of this Order, the practice of medicine shall be defined as any method of treatment or diagnosis of human ailment, disease, pain, injury, deformity, mental or physical condition.

3. Defendant may resume the operation of the Christian Health and Wellness Center ("Center") at 430 Franklin Avenue, Bloomfield, New Jersey so long as its activities are limited to naturopathy, nutritional counselling and spiritual guidance and do not extend to the diagnosis or treatment of medical conditions, the treatment of which is exclusively the province of duly licensed medical practitioners; provided that with respect to any prior person who has received goods or services from the Center, no further goods or services shall be provided unless that person has been examined by his or her own physician (M.D. or D.O.) or has been examined by a physician (M.D. or D.O.) duly licensed in New Jersey or New York in those instances where the person had complained of symptoms suggesting or diagnosed as having a medical ailment. Such examination shall not be necessary in cases where the person had no specific diagnosis or complaints and sought services only for general well-being. The Defendant shall require written evidence of such examination by a physician where required

prior to resumption of providing goods or services to that person. In case of any interpretation of this paragraph, the opinion of the Attorney General or his designee shall be controlling. Defendant shall provide the Attorney General or his designee access to the records of all prior persons who obtained goods and services from the Center under reasonable conditions and shall cooperate fully in the implementation of this paragraph. Prior to providing services to any client, the Defendant shall advise the client in writing:

(a) that medical evaluation is a recommended component of the Center's procedures; and

(b) that the Center's program is not a substitute for necessary medical care.

4. Defendant shall furnish each customer with a statement of what services Defendant may and may not provide. Such statement shall state specifically that no product sold by Defendant will remedy any specific physical ailment or condition, but that all products are intended only to improve the customer's general health and nutrition.

5. Defendant shall not represent to any customer that any product sold by Defendant or diet or procedure recommended by Defendant will remedy or cure any specific physical ailment or condition or deficiency of any element in the body, nor may he sell or distribute any literature which makes such claim, or makes any false or unproven claim.

6. Defendant shall cease and desist from holding himself out in any way as a "doctor" or "physician," using the title "Doctor," using the initials "M.D." or "N.D." in association with his name in any form of advertising (written or broadcast), brochures, stationery, business cards or directory listings. He shall cease and desist verbally referring to himself as "Dr." or "Doctor" or "M.D." or "N.D." and shall direct any answering service or office personnel to similarly cease referring to him as "Dr." or "Doctor" or "M.D." or "N.D."

7. Defendant shall not obtain any bodily fluids, hair samples or other substances from customers, shall not test or submit for testimony any such substances, or utilize any mechanical or electronic devices for examining, testing or measuring his customers in any way. Defendant may physically measure his customers' height, weight and body circumference with a tape measure or calipers, but may not perform any other type of physical examination.

8. Defendant shall not display any medical charts or depictions of bodily organs which make any reference to disease, diagnosis, treatment, remedies or cures. Defendant may display weight charts and depictions of the body which make no reference to disease or treatment.

9. Defendant shall permit unannounced inspections by representatives of the Attorney General or the Board of Medical Examiners and shall fully cooperate in such inspections to insure compliance with the provisions of the Order.

10. Should Defendant violate any of the terms of this Order, Plaintiffs may, on four days' notice, move in Superior Court, Chancery Division for an order permanently closing his premises at 430 Franklin Avenue, Bloomfield, and enjoining Defendant from engaging in similar activities elsewhere.

11. That a copy of this Order be served upon counsel for Defendant within 5 days of its entry.

/s/ Harry A. Margolis
Harry A. Margolis, P.J. Ch

APPENDIX G

FRED DEVESA
ACTING ATTORNEY GENERAL OF NEW JERSEY
BY: James F. Lafargue and Joyce Brown
Deputy Attorneys General
Division of Law 5th Floor
124 Halsley Street
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FILED
NOV. 16, 1993
HARRY A. MARGOLIS
P.J. Ch

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO. C-153-93

ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY and NEW JERSEY BOARD OF MEDICAL EXAMINERS,	CIVIL ACTION
Plaintiffs,	CONSENT ORDER
V.	
ERIC WOMACK,	
Defendant.	

This matter being opened to the Court on the application of the Attorney General of New Jersey, by James F. Lafargue and Joyce Brown, Deputy Attorneys General, counsel for Plaintiff State of New Jersey Board of Medical Examiners, pursuant to *N.J.S.A.* 45:1-23 and *R.* 4:52-1, and it appearing from the complaint in this matter and affidavits filed herewith, that Defendant Eric Womack has violated *N.J.S.A.* 45:9-18 and 45:9-22, by undertaking to diagnose and treat patients complaining of serious physical ailments, by dispensing substances purporting to relieve or cure those

ailments, knowing that he had no license to do so, and this matter having been heard in summary proceeding on June 24, 1993, Steven H. Gifis, Esq., appearing for Defendant, and the Court having imposed certain restraints against Defendant by order entered July 2, 1993,

IT IS on this 16th day of November 1993,

ORDERED that:

1. The Order Modifying Restraints entered against Defendant on July 2, 1993 in this matter is incorporated by reference in this Order, and shall fully remain in effect, permanently.

2. Defendant Eric Womack shall pay to the State of New Jersey the sum of $5,000.00 in civil penalties and $3,554.07 in investigative costs, plus interest as provided by *R.* 4:42-11, for the offenses alleged in the complaint and for holding himself out as eligible to treat, offering to treat and actually treating persons not named in the Complaint for physical ailments and illnesses.

3. Such payment shall be made in five equal monthly installments of $1,766.43, including 5.5% interest, by check payable to the State of New Jersey, to be received before the first day of each month commencing November 1, 1993, by the New Jersey State Board of Medical Examiners, 28 West State Street, Trenton, N.J. 08625. If any such monthly payment is 30 or more days late, the entire amount of costs and penalties shall become due and owing immediately, and the State may in its discretion deem this Consent Order to be void and proceed against Defendant for any and all penalties and costs provided by statute.

4. Upon completion of the above payments, the State of New Jersey shall return to Defendant all property taken as evidence in the above matter.

/s/ Harry A. Margolis
Harry A. Margolis P.J. Ch

Consents on page 3 hereof

We hereby consent to the form and entry of this Consent Order.

/s/ Eric Womack	FRED DEVESA, ACTING
Eric Womack, Defendant	ATTORNEY GENERAL
/s/ Steven H. Gifis	/s/ James F. Lafargue Joyce Brown
Steven H. Gifis, Esq.	By James F. Lafargue
Attorney for Defendant	and Joyce Brown
	Deputy Attorneys General

ORDERED THAT A COPY OF THIS ORDER SHALL BE SERVED UPON ALL COUNSEL WITHIN 7 DAYS OF THE DATE HEREOF.

APPENDIX H

N.J. Stat. Ann. 2C:21-20 (West 1995). Unauthorized practice of medicine and surgery or podiatry

A person is guilty of a crime of the third degree if he knowingly does not possess a license or permit to practice medicine and surgery or podiatry, or knowingly has had the license or permit suspended, revoked or otherwise limited by an order entered by the State Board of Medical Examiners, and he:

a. engages in that practice;

b. exceeds the scope of practice permitted by the board order;

c. holds himself out to the public or any person as being eligible to engage in that practice;

d. engages in any activity for which such license or permit is a necessary prerequisite, including, but not limited to, the ordering of controlled dangerous substances or prescription legend drugs from a distributor or manufacturer; or

e. practices medicine or surgery or podiatry under a false or assumed name or falsely impersonates another person licensed by the board.

L.1989, c.300 § 14, eff. Jan. 12, 1990.

APPENDIX I

N.J. Stat. Ann. 45:1-14 (West 1991). Legislative findings and declarations; liberal construction of act

The Legislature finds and declares that effective implementation of consumer protection laws and the administration of laws pertaining to the professional and occupational boards located within the Division of Consumer Affairs require uniform investigative and enforcement powers and procedures and uniform standards for license revocation, suspension and other disciplinary proceedings by such boards. This act is deemed remedial, and the provisions hereof should be afforded a liberal construction.

L.1978, c.73 § 1, eff. July 13, 1978.

APPENDIX J

N.J. Stat. Ann. 45:1-23 (West 1991). Summary proceeding in Superior Court; injunction; orders necessary to prevent unlawful practice or remedy past unlawful activity

Whenever it shall appear to a board, the director or the Attorney General that a violation of any act, including the unlicensed practice of the regulated profession or occupation, or regulation administered by such board has occurred, is occurring, or will occur, the Attorney General, in addition to any other proceeding authorized by law, may seek and obtain in a summary proceeding in the Superior Court an injunction prohibiting such act or practice. In any such proceeding the court may assess a civil penalty in accordance with the provisions of this act, order restoration to any person in interest of any moneys or property, real or personal, acquired by means of an unlawful act or practice and may enter such orders as may be necessary to prevent the performance of an unlawful practice in the future and to fully remedy any past unlawful activity. In any action brought pursuant to this section, the court shall not suspend or revoke any license issued by a board.

L.1978, c.73, § 10, eff. July 13, 1978.

APPENDIX K

N.J. Stat. Ann. 45:1-25 (West 1991). Violations; civil penalty; action to collect or enforce

Any person violating any provision of an act or regulation administered by a board shall, in addition to any other sanctions provided herein, be liable to a civil penalty of not more than $2,500.00 for the first offense and not more than $5,000.00 for the second and each subsequent offense. For the purpose of construing this section, each transaction or statutory violation shall constitute a separate offense; provided, however, a second or subsequent offense shall not be deemed to exist unless an administrative or court order has been entered in a prior, separate and independent proceeding. In lieu of an administrative proceeding or an action in the Superior Court, the Attorney General may bring an action in the name of any board for the collection or enforcement of civil penalties for the violation of any provision of an act or regulation administered by such board. Such action may be brought in summary manner pursuant to the Penalty Enforcement Act (N.J.S. 2A:58-1 *et seq.*) and the rules of court governing actions for the collection of civil penalties in the municipal court where the offense occurred. Process in such action may be by summons or warrant and in the event that the defendant in such action fails to answer such action, the court shall, upon finding an unlawful act or practice to have been committed by the defendant, issue a warrant for the defendant's arrest in order to bring such person before the court to satisfy the civil penalties imposed. In any action commenced pursuant to this section, the court may order restored to any person in interest any moneys or property acquired by means of an unlawful act or practice. Any action alleging the unlicensed practice of a profession or occupation shall be brought pursuant to this section or where injunctive relief is sought, by an action commenced in the Superior Court. In any action brought pursuant to this act, a board or the court may order the payment of costs for the use of

the State.

L.1978, c.73, § 12, eff. July 13, 1978. Amended by L.1991, c.91, § 449, eff. April 9, 1991.

APPENDIX L

N.J. Stat. Ann. 45:9-18 (West 1991) Persons regarded as practicing medicine and surgery

Any person shall be regarded as practicing medicine and surgery, within the meaning of this chapter, who shall use the words or letters "Dr.", "doctor", "professor", "M.D.", or "M.B." in connection with his name, or any other title intending to imply or designate him as a practitioner of medicine or surgery in any of its branches, and who, in connection with such title or titles, or without the use of such titles, or any of them, holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall either offer or undertake by any means or methods to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition. The provisions of this chapter shall apply to all persons professing and attempting to cure disease by means of the so-called system of "faithcurism", "mind-healing", "laying-on-of-hands", and other similar systems.

APPENDIX M

N.J. Stat. Ann. 45:9-22 (West 1991). Illegal practice; names of members of firm and of employees of others to be displayed; penalties; recovery of

Any person commencing or continuing the practice of medicine and surgery in this State without first having obtained a license, as provided in this chapter or any supplement thereto, or contrary to any of the provisions of this chapter or any supplement thereto, or who practices medicine and surgery under false or assumed name,

or falsely impersonates another practitioner of a like or different name, or buys, sells or fraudulently obtains a diploma as a doctor of medicine and surgery or any branch thereof, or method of treatment of human ailment, disease, pain, injury, deformity, mental or physical condition or a license to practice medicine and surgery, record or registration pertaining to the same, or any person, company or association who shall employ for a stated salary or otherwise, or aid or assist any person not regularly licensed to practice medicine and surgery, or who violates any of the provisions of this chapter or any supplement thereto, shall be liable to a penalty of two hundred dollars ($200.00), for the first offense. Every person practicing medicine and surgery under a firm name and every person practicing medicine and surgery or as an employee of another shall cause his name to be conspicuously displayed and kept in a conspicuous place at the entrance of the place where such practice shall be conducted, and any person who shall neglect to cause his name to be displayed as herein required, shall be liable to a penalty of one hundred dollars ($100.00). The penalties provided for by this section shall be sued for and recovered by and in the name of the State Board of Medical Examiners of New Jersey, in a summary manner, pursuant to "the penalty enforcement law," (N.J.S. 2A:58-1 *et seq.*) and the Rules Governing the Courts of the State of New Jersey. Process shall be either in the nature of a summons or warrant.

Amended by L.1939, c. 115, § 29; L.1952, c.300,. § 1; L.1953, c.43, § 40; L.1953, c.233, § 17; L.1989, c.153, § 21.